

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERARDO LUIS	:	MOTION TO VACATE
RODRIGUEZ RAMOS,	:	28 U.S.C. § 2255
BOP Reg. # 09407-069,	:	
Movant,	:	
	:	CRIMINAL ACTION NO.
v.	:	1:97-CR-128-SDG-AJB-1
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	1:21-CV-4175-SDG-AJB

UNITED STATES MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Movant, Gerardo Luis Rodriguez Ramos, confined in the Butner Low Federal Correctional Institution in Butner, North Carolina, submitted a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. [Doc. 101.]¹ The matter is before the Court for preliminary review pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings. For the reasons discussed below, the undersigned **RECOMMENDS** that the § 2255 motion be **DISMISSED** as untimely.

¹ Citations to the record in this Final Report and Recommendation refer to case number 1:97-cr-128-SDG-AJB-1.

I. Discussion

Movant was convicted of armed carjacking in the District of Puerto Rico in 1994 and sentenced to 420 months of imprisonment. [Doc. 97 at 2.] Movant was thereafter housed in the United States Penitentiary in Atlanta, Georgia, where he “set fire to a prison cell.” [*Id.*] On August 11, 1997, Movant pleaded guilty to arson, in violation of 18 U.S.C. § 81, and received a consecutive sentence of sixty-three months of imprisonment, followed by five years of supervised release. [*Id.* at 2-3.] Movant did not appeal. [*Id.* at 3.]

In his § 2255 motion, executed on October 4, 2021, Movant claims that (1) he “was coerced and/or induced to plead guilty under duress” because he “was placed in solitary confinement until he agreed to plead guilty,” (2) his attorney “performed inadequately,” and (3) he was improperly sentenced. [Doc. 101 at 1-4.] Movant asks the Court “to convert his [arson] sentence to run concurrent with his [armed carjacking] sentence.” [*Id.* at 4.]²

² Movant previously filed a motion for sentence reduction, [Doc. 92], to which the Government filed a response in opposition, [Doc. 97]. The District Court notified Movant that his § 2255 motion supersedes his motion for sentence reduction. [Doc. 98 at 5 n.4.]

Summary dismissal of a § 2255 motion is proper “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief” Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts. A § 2255 motion is subject to the one-year statute of limitations provided by 28 U.S.C. § 2255(f). The one-year period runs from the latest of the dates on which (1) Movant’s conviction became final; (2) a Government impediment to making the § 2255 motion was removed; (3) a right that Movant asserts was initially recognized by the United States Supreme Court, if the right has been newly recognized and made retroactively applicable to cases on collateral review; or (4) Movant, with due diligence, could have discovered the facts supporting his claims. *See* 28 U.S.C. § 2255(f)(1)-(4).

Under § 2255(f)(1), Movant had ten business days in which to appeal his conviction after he was sentenced on August 11, 1997. *See* Fed. R. App. P. 4(b)(1)(A)(i) & 26(a) (1997). Movant did not appeal, and the period in which to do so expired on August 26, 1997. Thus, Movant’s conviction became final on that

date, and the one-year statute of limitations expired on August 26, 1998.³ Movant executed his § 2255 motion more than twenty-three years late, on October 4, 2021.

Movant fails to show that (1) the circumstances set forth in § 2255(f)(2)-(4) apply, (2) he is entitled to equitable tolling,⁴ or (3) he is actually innocent.⁵ Therefore, the undersigned **RECOMMENDS** that the § 2255 motion, [Doc. 101], be **DISMISSED** as untimely.⁶

³ The one-year period is calculated using the “anniversary method, under which the limitations period expires on the anniversary of the date it began to run.” *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (internal quotation marks omitted).

⁴ “Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam).

⁵ “Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by [a movant’s] failure timely to file [a] § 2255 motion.” *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (per curiam). To demonstrate actual innocence, a movant must “support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A movant “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327.

⁶ “[D]istrict courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner’s habeas petition.” *Day v. McDonough*, 547 U.S. 198, 209 (2006); *see also* *Gay v. United States*, 816 F.2d 614, 616 n.1 (11th Cir. 1987) (per curiam) (“[T]he principles developed in habeas cases also apply to § 2255 motions.”) (citation omitted). “[B]efore acting on its own initiative,

II. Certificate of Appealability (COA)

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” Section 2253(c)(2) states that a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When the district court denies a [motion to vacate, set aside, or correct sentence] on procedural grounds without reaching the prisoner’s underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that

a court must accord the parties fair notice and an opportunity to present their positions.” *Day*, 547 U.S. at 210. The opportunity to object to this Final Report and Recommendation provides Movant with a fair opportunity to present any matter that requires a different disposition of the case. *See also Paez v. Sec’y, Fla. Dep’t of Corr.*, 947 F.3d 649, 655 (11th Cir. 2020) (per curiam) (holding that district court “did not abuse its discretion when it dismissed [a] § 2254 petition [as untimely] without ordering the [respondent] to respond”).

jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing *Slack*, 529 U.S. at 484) (internal quotation marks omitted).

A COA should be denied because the resolution of the issues presented is not debatable. If the District Court adopts this recommendation and denies a COA, Movant is advised that he “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts.

III. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that (1) the § 2255 motion, [Doc. 101], be **DISMISSED** as untimely, (2) a COA be **DENIED**, and (3) civil action number 1:21-cv-4175-SDG-AJB be **DISMISSED**.

The Clerk is **DIRECTED** to terminate the referral of the motion to vacate to the undersigned.

IT IS SO RECOMMENDED AND DIRECTED, this 23rd day of
November, 2021.

A handwritten signature in blue ink, appearing to be 'MJB', is written above a horizontal line.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE